STATE OF MICHIGAN

COURT OF APPEALS

In re O.F.F., Minor.

UNPUBLISHED
January 21, 2021

No. 354195
Ingham Circuit Court
Family Division
LC No. 20-000058-AM

Before: GADOLA, P.J., and BORRELLO and M. J. KELLY, JJ.

PER CURIAM.

Petitioner, the maternal grandmother of the minor child, appeals as of right the trial court's opinion and order (1) denying her motion for relief from judgment with respect to an adoption order that had allowed for the adoption of the minor child by his paternal grandparents and (2) additionally denying petitioner's request for a § 45 hearing pursuant to MCL 710.45(2), a provision of the Adoption Code, MCL 710.21 *et seq.*[1] For the reasons set forth in this opinion, we affirm.

[1] A § 45 hearing is a hearing at which a potential adopter may challenge a denial by the Michigan Children's Institute (MCI) of consent to adopt. MCL 710.45. As previously explained by this Court:

> The MCI superintendent represents the state of Michigan as guardian of all children committed to the state by a family court after termination of parental rights. MCL 400.203. The superintendent is authorized to consent to the adoption of any child committed to the MCI as a state ward. MCL 400.209. Consent by the superintendent to the adoption of a state ward is required before the family court can approve a prospective adoption. MCL 710.43(1)(b). Under MCL 710.45(2), a person who has filed a petition to adopt a state ward and has not received consent from the MCI may file a motion in family court to challenge the MCI superintendent's denial of consent. [*In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008).]

I. BACKGROUND

This case arises out of the adoption of the minor child at issue. After an incident involving domestic violence in the home when the minor child was just two months old, the minor child was removed from its parents' custody and placed with the minor child's paternal grandparents. In May 2018, the minor child's mother voluntarily relinquished her parental rights to the minor child and its father's parental rights were terminated.

Both petitioner and the paternal grandparents sought to adopt the minor child. On April 8, 2020, the superintendent of the Michigan Children's Institute (MCI) issued a decision denying petitioner's request to adopt the minor child on the ground that it was not in the child's best interests to be adopted by petitioner. In the denial decision, it was acknowledged that petitioner was "well-intentioned," that petitioner had a significant positive relationship with the minor child and that the minor child identified petitioner as its grandmother. The denial further noted, however, that the paternal grandparents were also pursuing adoption of the minor child, that the minor child had lived with the paternal grandparents for virtually its entire life, that the minor child had a secure attachment with the paternal grandparents, that the minor child identified the paternal grandparents as the minor child's "psychological parents," and that it would not be in the minor child's best interests to be removed from this "stable and satisfactory environment."

On April 17, 2020, the paternal grandparents filed a petition for immediate adoption. The trial court granted the paternal grandparents' petition and entered both the order placing the child and the order of adoption on April 22, 2020.

On June 4, 2020, petitioner filed a motion for relief from judgment and for a § 45 hearing. Petitioner requested that the trial court set aside the order of adoption so as to give petitioner an opportunity to pursue a § 45 hearing to challenge the MCI's withholding of consent for petitioner to adopt the minor child. The trial court denied petitioner's motion for a § 45 hearing on the basis that the motion was untimely under MCL 710.45(3) because an order of adoption had already been entered. The trial court denied petitioner's motion for relief from judgment because the court concluded that the order of adoption had been entered in accordance with the Adoption Code, such that petitioner had not shown that the order was void, that there was excusable neglect, or that there were just terms to justify granting relief from the order of adoption.

On appeal, petitioner argues that the trial court's denial of her motion violated her right to procedural due process protected under the Michigan and United States Constitutions. Const 1963, art 1, § 17; US Const, Am XIV. Petitioner argues that MCL 710.45 is unconstitutional on its face and as applied because it does not entitle an individual from whom consent to adopt has been withheld, such as petitioner, to notice concerning pending adoption proceedings filed by another individual or orders entered in such proceedings and, therefore, the statute does not provide a clearly discernable deadline for requesting a § 45 hearing and thereby deprives individuals such as petitioner of notice and a reasonable opportunity to be heard with respect to challenges to a denial of consent to adopt.

Petitioner further contends in support of her arguments that she only received her denial of consent on April 16, 2020, six days before the trial court entered the order placing the child and the order of adoption providing for the minor child's adoption by the paternal grandparents.

Petitioner argues that in this case, because she lacked notice of the petition for adoption filed by the paternal grandparents and thus was unaware of the specific time frame in which she had to file her motion for a § 45 hearing, she was effectively prevented from challenging the denial of consent for her to adopt the minor child.

II. STANDARD OF REVIEW

This Court reviews de novo questions of law, including issues involving the application and interpretation of statutes, see, *In re RFF*, 242 Mich App 188, 195; 617 NW2d 745 (2000), as well as issues of constitutional law such as whether a party's right to procedural due process was violated, see *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014).

"A party challenging the constitutionality of a statute has the burden of proving the law's invalidity." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016). "The challenging party must overcome a heavy burden because [s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Id*. (quotation marks and citation omitted; alteration in original).

III. ANALYSIS

"Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005), citing US Const, Am V; Const 1963, art 1, § 17; see also US Const, Am XIV. "A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient." *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993). "Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Reed*, 265 Mich App at 159. "At its core, [d]ue process requires the opportunity to be heard at a meaningful time and in a meaningful manner." *In re BGP*, 320 Mich App 338, 343; 906 NW2d 228 (2017) (quotation marks and citation omitted; alteration in original).

In this case, petitioner devotes a considerable portion of her appellate brief to the first prong of the procedural due process analysis, i.e., whether she possessed a protected liberty or property interest that was interfered with by the state. See *Jordan*, 200 Mich App at 448. It is unnecessary for us to address these arguments, however, because we conclude that even if she possessed a liberty or property interest under these circumstances, petitioner has failed to demonstrate that the statutory scheme deprived her of constitutionally sufficient procedures.

The statute challenged by petitioner, MCL 710.45, provides in relevant part as follows:

> (2) If an adoption petitioner has been unable to obtain the consent required by section 43(1)(b), (c), or (d) of this chapter, the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. . . .

* * *

(3) If consent has been given to another petitioner and if the child has been placed with that other petitioner according to an order under section 51 of this chapter, a motion under this section shall not be brought after either of the following:

(a) Fifty-six days following the entry of the order placing the child.

(b) Entry of an order of adoption.

Petitioner argues that this statute is unconstitutional because it does not provide an ascertainable deadline for filing a motion challenging the denial of consent to adopt and because the events listed in MCL 710.45(3) could occur—and cut off a petitioner's right to challenge a denial of consent—without the petitioner's knowledge or notice of the separate adoption petition filed by another individual. As petitioner acknowledges, she was not an interested party under MCL 710.24a[2] with respect to the separate adoption petition filed by the minor child's paternal

[2] MCL 710.24a provides in pertinent part:

(1) Interested parties in a petition for adoption are all of the following:

(a) The petitioner or petitioners.

(b) The adoptee, if over 14 years of age.

(c) A minor parent, adult parent, or surviving parent of an adoptee, unless 1 or more of the following apply:

(*i*) The rights of the parent have been terminated by a court of competent jurisdiction.

(*ii*) A guardian of the adoptee, with specific authority to consent to adoption, has been appointed.

(*iii*) A guardian of the parent, with specific authority to consent to adoption, has been appointed.

(*iv*) The rights of the parent have been released.

(*v*) The parent has consented to the granting of the petition.

(d) The department or a child placing agency to which the adoptee has been, or for purposes of subsection (3) is proposed to be, released or committed by an order of the court.

grandparents and was thus not statutorily entitled to notice in that case. As such, petitioner contends that the "procedures set out by MCL 710.45 are inadequate to protect [petitioner's] interests in her relationship with the child and in her right to challenge the consent denial because they do not provide her with proper notice and an opportunity to be heard."

Petitioner's arguments focus primarily on her alleged lack of notice of the adoption proceedings instituted by the paternal grandparents.[3] She argues that such notice "is imperative, because the petitioner's time to file [their] motion is based entirely on actions taken in the adoption proceedings initiated by another, and the petitioner is not provided notice of those proceedings." According to petitioner, because such notice is not statutorily required, MCL 710.45 denies notice of the applicable deadline and of a reasonable opportunity for filing a motion to challenge a denial of consent to adopt.

It is undisputed that MCL 710.45 provides a mechanism for challenging a denial of consent to adopt, see MCL 710.45(2), although MCL 710.45(3) provides that the occurrence of certain circumstances will terminate the ability to pursue such a challenge under MCL 710.45(2). A party who has been denied consent to adopt therefore has a means under MCL 710.45(2) for challenging

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> (e) A parent, guardian, or guardian ad litem of an unemancipated minor parent of the adoptee.
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> (f) The court with permanent custody of the adoptee.
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> (g) A court with continuing jurisdiction over the adoptee.
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> (h) A child placing agency of another state or country that has authority to consent to adoption.
>
> (i) The guardian or guardian ad litem of an interested party.
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> * * *
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> (6) In the interest of justice, the court may require additional parties to be served.

[3] We note that although petitioner appears to claim as part of her argument that she should have been considered an interested party to those proceedings such that she should have been given notice, she does not claim to have actually been a party to those proceedings. Thus, we question whether petitioner was permitted under the court rule to file a motion for relief from a judgment to which she was not a party, i.e., the order of adoption involving the paternal grandparents and O.F.F. See MCR 2.612(C) ("On motion and on just terms, the court may relieve a *party or the legal representative of a party* from a final judgment, order, or proceeding on the following grounds . . . .") (emphasis added). However, considering that no opposing brief has been filed in this case and that the issue was not raise, we need not resolve this question.

that denial of consent in court, hence, providing such a party with a meaningful opportunity to be heard. *Reed*, 265 Mich App at 159; *In re BGP*, 320 Mich App at 343.

Petitioner does not explain how such proceedings fail to satisfy due process. Thus, petitioner has failed to meet her burden of showing that MCL 710.45 is unconstitutional on its face. *Bonner v City of Brighton*, 495 Mich 209, 223; 848 NW2d 380 (2014) ("A party challenging the facial constitutionality of [a statute] faces an extremely rigorous standard. To prevail, plaintiffs must establish that no set of circumstances exists under which the [statute] would be valid and [t]he fact that the . . . [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid.") (quotation marks and citations omitted; third alteration and ellipsis in original).

Turning to petitioner's as-applied challenge, we consider the specific facts of this case and petitioner's specific arguments. See *In re Forfeiture of 2000 GMC Denali*, 316 Mich App at 569 (stating that an as-applied challenge to a statute's constitutionality involves an alleged "present infringement or denial of a specific right or of a particular injury in process of actual execution of government action") (quotation marks and citation omitted).

Here, petitioner failed to avail herself of the mechanism provided in MCL 710.45(2). She could have filed her motion to challenge her denial of consent immediately upon receiving the denial, or soon thereafter. Had petitioner done so, the trial court would have been unable to enter the order of adoption providing for the child to be adopted by the paternal grandparents. See MCL 710.56(4) (prohibiting an order of adoption from being entered while a motion under MCL 710.45 is pending). This course of action would have prevented petitioner's ability to challenge the denial of consent from being foreclosed under these circumstances.

Nonetheless, petitioner claims she was denied a meaningful opportunity to challenge her denial of consent by her lack of notice of the adoption proceedings initiated by the paternal grandparents; arguing that the procedures currently provided by the statutory scheme were insufficient to protect her procedural due process rights. However, the core of petitioner's argument is there should be different, additional procedural protections. In particular, petitioner seems to advocate for a right to notice of other adoption proceedings initiated by any other individual with respect to the subject adoptee. However, such arguments are grounded not in constitutional law but rather policy. As this Court has observed: "[a]rguments that a statute is unwise or results in bad policy should be addressed to the Legislature." *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 462; 639 NW2d 332 (2001). A litigant's belief that a statute is unwise or unfair does not, by itself, establish that the statute is unconstitutional. *Id*.

Here, we are tasked with evaluating whether the current procedures provided by the statutory scheme adequately protected petitioner's procedural due process rights or whether additional procedures were constitutionally required. To answer this question, we apply the balancing test enunciated by the United States Supreme Court in *Mathews v Eldridge*, 424 US 319, 334-335; 96 S Ct 893; 47 L Ed 2d 18 (1976). See also *In re Sanders*, 495 Mich at 410-411 (applying the *Mathews* test in the procedural due-process context). In *Mathews*, the Court noted that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands," thus holding that resolving the issue whether currently provided procedures "are constitutionally sufficient requires analysis of the governmental and private interests that are

affected." *Mathews*, 424 US at 334 (quotation marks and citation omitted). The *Mathews* Court set forth the following test for evaluating the balance between the governmental and private interests affected:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id*. at 335.]

Here, petitioner has not cited to this test and has failed to apply this legal framework to her argument that the existing procedures for challenging a denial of consent to adopt are constitutionally insufficient. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Id*. at 339-340. Hence, petitioner's argument is abandoned.

Moreover, even if we were inclined to consider petitioner's argument, our review does not reveal any evidence to base a finding of the current procedures being constitutionally inadequate. We note that the stated purposes of the Adoption Code include "achiev[ing] permanency and stability for adoptees as quickly as possible." MCL 710.21a(d). Additionally, MCL 710.21a(b) sets forth the intent to "provide procedures and services that will safeguard and promote the best interests of each adoptee in need of adoption and that will protect the rights of all parties concerned" but further states that "[i]f conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount." In light of the strong governmental interest in providing permanency and stability for adoptees as quickly as possible, we find nothing unreasonable about requiring parties seeking to adopt the adoptee to act promptly in pursuing the adoption, including filing challenges to a denial of consent if they wish to do so. This is especially true in cases such as this one---where one party is aware that another party is also going to request to adopt the minor child at issue. Consequently, we conclude that petitioner has failed to meet her burden of showing that the statute is unconstitutional as applied to her or that she was deprived of constitutionally sufficient procedural due process.

Affirmed.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello
/s/ Michael J. Kelly